Supreme Court, U.S.
FILED

01-36 MAY 0 1 2001

OFFICE OF THE CLERK

No. •

IN THE

SUPREME COURT OF THE UNITED STATES

Jeffrey R. Scarcelli - PETITIONER

Vs.

Commonwealth of Pennsylvania – RESPONDENTS(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Pennsylvania Western District

PETITION FOR WRIT OF CERTIORARI

Jeffrey R. Scarcelli - Pro Se

1019 Sleepy Hollow Road

Jeannette, Pennsylvania 15644

(724) 523-5385

QUESTIONS PRESENTED

1. Whether lower court's ruling in the pretrial determination to allow defendant's credibility witnesses to be cross-examined by Commonwealth regarding defendant's prior arrest and penalty of ARD was in violation of the Defendant's Constitutional Rights.

2. Whether lower court erred in failing to submit "stop sign charge" to jury for ruling in violation of Defendant's right to jury trial as was requested by Defendant.

3. Whether lower court violated the Defendants Constitutional Rights by not submitting the court's penalty of the "stop sign violation" to the jury for use in their deliberation on the other charge.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

John W. Peck, Esquire,
Office of the District Attorney
2 North Main Street
Greensburg, PA 15601

State Attorney General
Honorable Mike Fisher
PA Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

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TABLE OF AUTHORITIES CITED

CASES

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Commonwealth v. Scott, 436 A. 20 607.....
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Baldwin v. New York, 26 C. Ed 2d 437 (1970).....
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Blanton v. City of North Las Vegas Nevada, 103 L. ED. 2d 550 (1989).....
Commonwealth V. Mayernik, 72 PA d&c. 10, 98 Pitts. L.J. 213 (1950).....
Commonwealth v. Tiffany, 121 PA 15 a 462 (1888)....
Commonwealth v. Comer.....
Commonwealth v. Fiore, 665 A. 2d 1185, 1193 (PA. Superior 1995).....
Commonwealth v. Dugger, 486 A. 2d 382, 386 (PA 1985).....
Commonwealth v. Randolph, 718 A. 2d 1242, 1245 (PA. 1998).....

STATUTES AND RULES

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Fourteenth Amendment.....

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Superior Court of Pennsylvania in this matter was entered at No. 1447 WDA 1999 on April 13, 2000. A copy of the Opinion of the panel is attached hereto, made a part thereof, and marked as Petitioner's Appendix E (1-4).

The Superior Court of Pennsylvania affirmed the Order of Common Pleas of Westmoreland County, Pennsylvania, Criminal Division, dated August 3, 1999, and denies the defendants Application for Reargument and/or Reconsideration on June 22, 2000. The Opinion of the Honorable Judge Richard E. McCormick, Jr. in this matter was entered at No. 1967 C 1998 on September 25, 1999. A copy of the Order and Opinion are attached hereto, made a part thereof, and marked as Petitioner's Appendix B(1,2), F(1-3).

JURISDICTION

On November 2, 2000, the Supreme Court of Pennsylvania denied the Petitioner's Allowance of Appeal. (see APPENDIX C).

A timely petition for rehearing was thereafter denied on February 1, 2001. (see APPENDIX D).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

IN THE SUPREME OF PENNSYLVANIA
OPINION FROM COMMONWEALTH V. MORGAN

MR. JUSTICE NIGRO

"Indeed, it would be nothing short of illogical to preclude the Commonwealth from cross-examining defense character witnesses about a defendant's prior arrest yet allow it to cross-examine such witnesses about allegations of a defendant's prior criminal misconduct which had never resulted in an arrest."

OPINION FROM COMMONWEALTH V. SCOTT

WITNESSES 274(2)

In criminal prosecution, defendant was denied fair trail when trail court ruled that proposed defense witnesses, who intended to testify that the defendant had good reputation for honesty and peacefulness, could be cross-examined about defendant's two prior arrest, neither of which had led to a conviction.

OPINION FROM DUNCAN V. LOUISIANA

MR. JUSTICE WHITE

"The Constitution itself, in Art. III §2, commanded:"
"The Trail of all Crimes, except in Cases of Impeachment,
*[391 US 153]
shall be by Jury; and such Trail shall * held in the State where the said Crimes shall have been committed."

OPINION FROM DUNCAN V. LOUISIANA

MR. JUSTICE WHITE

"Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In either it is necessary to draw a line in the spectrum of crime, separating petty *[391 US 161] from serious * infraction. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little."

OPINION FROM COMMONWEALTH V. COMER

, JUSTICE

"Our reading of the above precedent leads us to conclude that driving under the influence of intoxicating substance does not create legal recklessness per se but must be accompanied with other tangible indicia of unsafe driving to a degree that creates a substantial risk of injury which is consciously disregarded. Whether in this context, the unsafe driving results from diminished judgment, a more cavalier approach to driving or sheer physical incapacitation would seem immaterial, as is the degree to which any of these factors is actually related to the consumption of alcohol or drugs. What is material is actual reckless driving or conduct, for any reason, for it is this conduct which creates the peril in question. Since people vary in their response to alcohol we believe this is a sound principle."

PA R.E. 403

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of under delay, waste of time, or needless presentation of cumulative evidence.

Comment

Pa. R.E. 403 differs from F.R.E. 403. The federal rule provides that relevant evidence may be excluded if its probative value is "substantially outweighed." Pa. R.E. 403 eliminates the word "substantially" to conform the text of the rule more closely to Pennsylvania law. "Unfair prejudice" means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.

CONSTITUTIONAL LAW § 419 ; JURY § 17(6a), (6b)
AS STATED IN **BLANTON V. NORTH LAS VEGAS**

EVIDENCE § 419; JURY § 17

Right to jury trail – offenses with maximum prison term of 6 months or less – presumption.

6a, 6b, Where an offence carries a maximum term of 6 months or less, it is appropriate to presume, for purposes of the Federal Constitution's sixth Amendment, that society views such offense as "petty," and one accused of such offense is entitled to a jury trail, under the Sixth Amendment, only if the accused can demonstrate that any additional penalties which result from state action – such as penalties which are mandated by statute or regulation – are so severe, when viewed in conjunction with the maximum prison term, that they clearly reflect a legislative determination that the offense in question is a "serious: one."

CONSTITUTIONAL LAW § 846 – DUE PROCESS – SELF-INCRIMINATION
AS STATED IN **DUNCAN V. LOUISIANA**

CONSTITUTUIONAL LAW § 846

The due process clause of the Fourteenth Amendment protects the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination.

CONSTITUTIONAL LAW §§ 38, 842 – DUE PROCESS – RIGHT TO JURY TRAIL

The due process clause of the Fourteenth Amendment guarantees a right of jury trail in all state criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment's guaranty of trail by jury.

CONSTITUTIONAL LAW § 17 – Sixth Amendment JURY § 1.5 – RIGHT TO JURY TRAIL

The right to jury in criminal cases is fundamental to the American system of justice.

CONSTITUTIONAL LAW § 842 – DUE PROCESS – RIGHT TO JURY TRAIL

The deep commitment of the nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the due process clause of the Fourteenth Amendment, and just therefore be respected by the states.

[391 US 156]
OPINION FROM DUNCAN V. LOUISIANA

MR. JUSTICE WHITE

The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt of overzealous prosecutor and against the complaint, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trail provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

STATEMENT OF THE CASE

On June 11, 1998, the Petitioner was charged with violating 75 Pa. C.S.A. §§ 3731(a)(1), (a)(4) and 75 Pa. C.S.A. § 3323(a). These charges stemmed from the Petitioner's operation o0f his motor vehicle on March 29, 1998 in North Huntington Township, Westmoreland County. Petitioner had seven years prior succcessfully completed an ARD based on a DUI arrest.

During pre-trail proceedings, Petitioner's counsel argued that Petitioner should be able to present character witness and that the character witness should not be exposed to cross-examination regarding their knowledge of Defendant's 1993 arrest for DUI, and the subsequent ARD. Petitioner's counsel cited Commonwealth V. Scott, 496 Pa. 188, 436 A.2d 607(1981) and Pa R.E. 405 to support the argument. Commonwealth V. Morgan, No. 32 W.D. Appeal Docket 1998 J-176-1998 had not been decided at that time. The trail court determined that although the character witness could not be cross-examined regarding the actual arrest itself, they could be cross-examined regarding the factual circumstances that caused the Petitioner's arrest and the eventual ARD, i.e. Petitioner's failed BAC test following his arrest and his and his actions at the time of the arrest, etc. The trail court stated that "the fact that he was arrested is separate and apart from the fact that the factual circumstance occurred...". Based on the holding of the trail court, the Petitioner's counsel determined not to use character witnesses.

The case proceeded to a jury trail. On August 4, 1999, the jury found the petitioner guilty of violating § 3731(a)(1) and not guilty of violating § 3731(a)(4). Judge McCormick denied Defendant's request to have the "stop sign" charge of 75PA C.S. § 3323(a) to be ruled upon by the jury. He cites Baldwin V. New York.

Petitioner brought a timely *pro se* appeal to the Superior Court of Pennsylvania where petitioner argued that based on Commonwealth V. Scott and Pa. R.E. 405(a) the trail court erred in pre-trail determination to allow defendant's credibility witnesses to be cross-examined by the Commonwealth regarding the factual circumstance related to his prior arrest for DUI, e.g. the failure of the BAC test administered immediately following his 1993 arrest for DUI.

While the Superior Court was already deciding the appeal, the Supreme Court of Pennsylvania's opinion for Commonwealth V. Morgan, became available to Petitioner. As such, the Superior Court decided on the trail court's pre-trail ruling regarding cross-examination of witnesses, (and without the benefit of considering Commonwealth V. Morgan), and upheld the trail court ruling. Petitioner then filed a timely *pro se* Petition for Reargument/Reconsideration based on 210 Pa. Code §§ 65.38(b)(1) that the decision of the Superior Court was inconsistent with a decision of the Supreme Court, and under 210 Pa. Code §§ 65.38(b)(2) arguing that the Superior court overlooked relevant precedent, i.e. Commonwealth V. Morgan.

On June 22, 2000 the Superior Court issued its Order denying the Petition for Reargument/Reconsideration. Petitioner then filed timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania; denied on November 2, 2000. Petitioner then filed a timely Petition for Reconsideration; denied February 1, 2001.

REASONS FOR GRANTING THE PETITION

The Petitioner recognizes that this is not an error-correcting Court and that allowance of appeal "is not a matter of right, but of sound judicial discretion, but to decide cases presenting issues of importance beyond the particular facts and parties involved". 28 U.S.C. § 2101(e).

Here, the Superior Court failed to apply current Supreme Court Precedent of Commonwealth V. Scott as well as Pa RE 405(a). In addition, the Superior Court subsequently declined to re-examine its holding in light of the Supremes court's newest applicable precedent in Commonwealth V. Morgan which interprets the previous question on a similar fact pattern that exist where the defense also chose not to use character witnesses and where the Supreme Court of Pennsylvania found that the trail court committed reversible error. Specifically, the Superior Court here affirmed the trail court's invention of the bifurcation of an arrest for the purpose of a Pa.R.E. 405(a) analysis in which it separates the factual actions that cause an arrest from the actual act of the arrest itself in determining what is admissible for cross-examination of character witnesses. Such a bifurcation is not suggested in either PaRE 405(a) or in Pennsylvania Supreme Court case law which applies PaRE 405(a). In fact, such a bifurcation conflicts with Pennsylvania Supreme Court case law as well as Pennsylvania statute. Furthermore, the trail court's ruling specifically did harm to the Petitioner here given the jury's final outcome.

Specific harm to Petitioner

The Petitioner, at the advice of counsel, determined not to use character witnesses in his defense as a result of the trail court's pre-trail ruling. As such, the trail court's analysis was particularly harmful to the Petitioner because he was found not guilty under § 3731(a)(4) but guilty under §

3731(a)(1). § 3731(a)(4) states "a person shall not drive, operate or be in actual physical control of the movement of any vehicle: (4) while the amount of alcohol by weight in the blood of the person is 0.10% or greater,..." 75 Pa. C.S.A. § 3731(a)(4). Under this section, Petitioner agrees, character witnesses may not prove extremely helpful if ones BAC is proven to exceed the legal limit. However, in this case, the jury found the Petitioner not guilty under § 3731(a)(4) and found him guilty under § 3731(a)(1), driving while under the influence of alcohol to a degree rendering him incapable of safe driving. 75 Pa.C.S.A. § 3731(a)(1). This standard is much more a substantive question of fact and could easily be affected by defense character witnesses which could describe their impression of wether the Petitioner on that night, or often, drove while under the influence of alcohol to a degree rendering him incapable of safe driving.

Both of these violations serve the same penalties, even if the DUI offense involved 'man-slaughter'. The accused, if found guilty cannot receive a work related driving license for one year; thus creating a class of people having extreme difficulty paying their debt and contributing back to society.

Cross-examination of Character Witnesses

Pa. R.E. 405(a) states in pertinent part that "on cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character traits in question, except that in criminal cases inquiry into arrests of the accused not resulting in conviction is not permissible." Pa. R.E. 405(a)(emphasis added).

In Commonwealth V. Scott, the court held that the trail court erred in ruling that the defendant's proposed character witnesses could be cross-examined about their knowledge of the defendant's two prior arrest, neither of which led to a conviction. In so holding, the Court reasoned

that since an arrest is equally consistent with either guilt or innocence, cross-examining a character witness on those arrests which do not carry the conclusive determination of guilt by conviction, should not be permitted. Commonwealth V. Scott, 496 Pa. 188, 196, 436 A.2d 607, at 612.

In the case here, the opinion of the Superior Court focuses exclusively on the opinion filed by the trail court and not on the pre-trail transcript. Apparently, the pre-trail transcript was not part of the originally filed record but was attached to the brief which the Petitioner filed *pro se*. Further, the pre-trail transcript was included in Petitioner's *pro se* Petition for Reconsideration. However, the trail court opinion is in conflict with the pre-trail transcript. The opinion does not make clear that the trail court was prepared to allow the cross-examination of the character witnesses themselves about their knowledge of the facts surrounding the Petitioner's previous arrest as long as there was no mention that the Petitioner was arrested, i.e. the failed BAC test following the traffic stop that led to the arrest and ARD. The opinion of the trail court simply states that it was prepared to allow a third witness, the arresting police officer for the prior DUI, to testify with his observations of the Defendant in an intoxicated state. The trail court opinion makes no mention that it was also prepared to allow the cross-examination of the character witnesses themselves regarding the events that led up to the prior arrest and ARD. Yet, the pre-trail transcript shows at several points that the trail court intended to allow such questioning. For example:

> [Defense]: ..[w]hat are you permitted to ask, because then I have to make a decision whether to put character witnesses on, and not putting on character witnesses can be ineffective counsel so I need to know the parameters.
>
> [Commonwealth]: I would phrase the question in that

fashion. If there's a BAC substantiating that he was under the influence or intoxicated, I would ask that person about that....

[The Court]: And I would approve of that. That's admissible in that form.

Apparently, the trail court's position rests on its belief that there exists a separation of the arrest from the factual occurrences which caused the arrest for the purpose of the application of Rule 405(a).

In Commonwealth V. Morgan, the Supreme Court recently described "it would be nothing short of illogical to preclude the Commonwealth from cross-examining defense character witnesses about a defendant's prior arrests yet allow it to cross-examine such witnesses about allegations of a defendant's prior criminal misconduct which has never resulted in an arrest." Obviously, then' it is the allegation or suggestion of misconduct that this Court is focused on not the arrest itself. It is the suggestion of misconduct, whether the suggestion is by an arrest or by allegation, that this Court deems to cause an unfair prejudice and only allows exception in cases where the arrest leads to conviction. In the case here, it would also be perfectly illogical to preclude the Commonwealth from cross-examining defense character witnesses about a defendant's prior arrest which did not result in a conviction (i.e. the ARD DUI) yet allow it to cross-examine such witnesses about their awareness of the events that caused or surrounded the arrest, i.e. the failure of a BAC following the traffic stop and arrest that resulted in a DUI and ARD.

Two obvious conflicts exist in the trail court's position, first, the failed BAC test information is only artificially separated from the arrest itself and most likely would be a clear indication to the jury of an arrest, and, second the prejudicial value is significant and substantial, whether the word "arrest" is used or not.

The factual occurrences involved in the Petitioner's prior DUI arrest make obvious why facts of an arrest are as equally damaging as the arrest itself. BAC tests are typically administered in DUI situations, they are rare in almost any other situation. As such, a BAC result would at least strongly suggest that it was given in the context of a vehicle operation situation. Furthermore, a BAC that substantiated that Petitioner "was under the influence or intoxicated", as the Commonwealth stated it would ask in cross-examination, would almost certainly suggest to a jury that the Petitioner was previously arrested for a DUI.

In Commonwealth V. Morgan, where there were no arrest but rather allegations, the Supreme Court would not have found the prejudice without the arrest. However, in fact, the Supreme Court found reversible error.

By allowing cross-examination of character witnesses regarding the facts that led or surrounded the arrest, the Superior Court creates a "back door" through which the Commonwealth can introduce prejudicial information regarding arrests that do not lead to conviction. For example, were a character witness to deny knowledge of the prior BAC test which substantiated that Petitioner was previously under the influence, could the Commonwealth then introduce evidence to prove that the test result existed, perhaps admitting the results themselves? Would the trail court then suggest that an officer of the law previously administered a BAC test to the Petitioner would not further suggest to the jury that there was a previous arrest.

The Superior Court failed to follow the Court's precedent in determining allowable cross-examination of character witnesses. Regardless of the Supreme Court's discretion to look at what actually occurred at trail to determine if actual prejudice existed on presenting the defense, the Superior Court ignored what occurred at trail and the holdings of the trail court. Such deviation reveals that

the Superior Court so far departed from accepted judicial practices and so abused its discretion that this court should exercise its supervisory authority.

The function of the appellate court is to correct errors, not to create them from a misstatement and misapplication of the law. The Superior Court is to maintain and effectuate decisional law of Pennsylvania Supreme Court as faithfully as possible. Commonwealth V. Fiore, 665 A.2d 1185, 1193(Pa. Super. 1995)(citing Commonwealth V. Dugger, 486 A.2d 382,386 (Pa. 1985)). It is "obligated to apply and not evade [Pennsylvania Supreme Court] decisions. It is a fundamental precept of our judicial system that the lower tribunal may not disregard the standards articulated by a higher court. Commonwealth V. Randolph, 718 A.2d 1242, 1245 (Pa. 1998).

Stop sign violation

If the accused can demonstrate that any additional penalties are so severe that they clearly reflect a legislative determination that the offense in question is a "serious one".

Judge McCormick did not allow jury to rule on testimony involving 75PA C.S. § 3323(a) : (stop sign violation), yet he allowed them to hear testimony. Officer Arendas testified to enacting his patrol lights as a result of the "California stop" he witnessed. The Defendant was forced into self-incrimination; violating his right under Constitutional Law § 846 - due process – self-incrimination, As was stated in Duncan V. Louisiana, 20 L. ED. 493.

The reason Officer Arendas enacted his lights was because of the "stop sign" violation, this allowed intent to pull over the Petitioner. This fact does not attribute the Defendant's wrong to DUI.

The effect of jury not being allowed to rule on the "stop sign" violation led the jury to believe that if the Defendant was not to be tried for that violation they would

find him guilty of another charge. In doing so, the Defendant faces a sentence of at least sixty days in prison, a one year Drivers License Suspension with no possibility of a work restricted license, intermediate counseling of several nights per week, and mandatory AA meetings for a year. Because of these additional penalties the Petitioner believes strongly that the jury should have been able to rule on the charge of 75 PA C.S. § 3323(a), since it was so intrinsically woven in the allegations of the Commonwealth, making an attempt to convict on the other charge otherwise impossible.

Failure to rectify the Superior Court's misapplication of precedent will result in substantial confusion and misapplication of precedent throughout the Pennsylvania courts. This Court should grant allowance of appeal to correct this gross departure from this Court's precedent.

Petitioner submits that a panel of the Superior Court has decided a question of substance in a way not in accord with applicable decisions of this Honorable court. Petitioner further submits that a panel of the Superior Court of Pennsylvania has rendered decisions which are in conflict with decisions rendered by another panel of that court as well as the Pennsylvania Supreme Court.

WHEREFORE, for the for-mentioned reasons, Petitioner, Jeffrey Ross Scarcelli, repectfully request this Honorable Court to enter an order granting an allowance of appeal for the Order of the Supreme Court of Pennsylvania entered in this matter at No. 446 WAL 2000 on February 1, 2001.

Respectfully Submitted,
By:
"s/ Jeffrey R. Scarcelli"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

"s/ Jeffrey R. Scarcelli"
Jeffrey R. Scarcelli

Date: April 29, 2001

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY

Jeffrey Scarcelli
705 Seventh Street
Trafford, PA. 15085

IN RE: Commonwealth of Pennsylvania vs. Jeffrey Scarcelli
No. 1447 WDA 1999

Dear Mr. Scarcelli:

The Court has entered the following Order on the Application for Reargument or Reconsideration in the above-captioned matter:

"ORDER OF COURT

The Court hereby DENIES the application filed April 17, 2000, requesting reargument or reconsideration of the decision dated April 13, 2000.

Date: June 22, 2000

PER CURIAM"

Very truly yours,
"s/ Eleanor R. Valecko"
Deputy Prothonotary

Appendix A

INTERMEDIATE PUNISHMENT ORDER OF COURT/SENTENCE

COMMONWEALTH VS. "S/JEFFREY R. SCARCELLI"

ONT E9209211
CO# 1967C1998

SENTENCING

NOW August 3, 1999, the Actor is Ordered to:

CT# 1 – Pay costs of prosecution, pertinent constable fees, Supervision fee of $25.00 per month during term of court supervision, and costs of treatment or other ordered programs.

- EMSA fee of $10.00
- C.A.T. fund surcharge of $100.00
- Fine of $300.00
- Intermediate punishment for a period of one year-first sixty days E.H.M.
- Work release granted
- Suspension of operator's license for a period of one year
- Attend and successfully complete Alcohol Highway Safety School
- Have a CRN evaluation

SENTENCING ON SUMMARY COUNTS:

CT# 3 – Fine $25.00
- C.A.T. $30.00 and costs

Appeal Rights given

Remarks/Comments/Additional Conditions – Defendant found not guilty at CT# 2

BY THE COURT
"s/ Richard E. McCormick"

WESTMORELAND COUNTY COURT OF COMMON PLEAS
Tenth Judicial District of Pennsylvania
Westmoreland County Courthouse
Greensburg, PA 15601

INTERMEDIATE PUNISHMENT
SENTENCE AND ORDER FOR TAXING COST

CO# 1967C1998
Commonwealth vs. "s/ Jeffrey R. Scarcelli"
Judge Richard E. McCormick

1. D.U.I. - § 3731(a)(1) – Grade M-2
2. D.U.I. - § 3731(a)(4) – Grade M-2
3. Disregard Stop Sign - § 3323(a) – Grade 5

Commonwealth Attorney "s/ Al Powanda"
Defense Attorney "s/ Tim Dawson"
Prosecutor "s/ Ptlm. Gregory Arendas"
Court Reporter "s/ Judith M. Shutak"
Court Clerk "s/ Barbara Keys"

14 COPIES
3 COPIES
CERTIFIED

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 446
	: W.D.
Respondent	: Alloc.
	: Dkt.
	: 2000
V.	:
	: Petition
	: for
	Allowance
	: of Appeal
JEFFREY SCARCELLI	: from
	: Order
Petitioner	: of the
	: Superior
	: Court

ORDER

PER CURIAM

AND NOW, this second day of November, 2000, the Petition for Allowance of Appeal is denied.

A True Copy Shelly A. Carrara
As of: November 2, 2000
Attest: "s/ Shelly A. Carrara"
Deputy Prothonotary
Supreme Court of Pennsylvania

Appendix C

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 446
	:	WAL
Respondent	:	2000
	:	
	:	Petition
V.	:	for
	:	Re
	:	consider
	:	action
JEFFREY SCARCELLI,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this First day of February, 2001, the Petition for Reconsideration is denied.

A True Copy Patricia Honard
As of: February 2, 2001
Attest: "s/ Patricia Honard"
Chief Clerk
Supreme court of Pennsylvania

Appendix D

Commonwealth of Pennsylvania,	:	In the Superior
	:	Court of
Appellee	:	Pennsylvania
	:	
V.	:	
	:	
	:	
	:	
Jeffrey Scarcelli	:	
	:	
Appellant	:	No. 1447 WDA
	:	1999

Appeal from the Judgment of Sentence entered August 3, 1999 in the Court of Common Pleas of Westmoreland County, Criminal Division, at No. CC No. 1967C 1998.

BEFORE: CAVANAUGH, ORIE MELVIN AND BROSKY, JJ.

FILED APR 13 2000

MEMORANDUM:

The Appellant, Jeffrey Scarcelli, appeals *pro se* from the judgment of the sentence entered following his conviction of driving under the influence of alcohol and the summary violation of stop signs and yield signs. For reasons that follow, we affirm.

The procedural history may be summarized as follows. On June 11, 1998, the appellant was charged with violating 75 Pa.C.S.A. §§ 3731(a)(1), (a)(4) and 75 Pa.C.S.A. § 3323(a). These charges stemmed from the Appellant's operation of his motor vehicle on March 29, 1998 in North Huntington Township, Westmoreland County. The case proceeded to a jury trail. At the close of trail, the trail court found the Appellant guilty of violating the summary offense

of § 3323(a) for disregarding a stop sign. On August 4, 1999, the jury found the Appellant guilty of violating § 3731(a)(1) and not guilty of violating § 3731(a)(4).

The Appellant's § 3731(a)(1) conviction was considered a second DUI offense for sentencing purposes. On August 3, 1999, the Appellant was sentenced on the § 3731(a)(1) to one (1) year intermediate punishment with the first sixty (60) days served in the electronic monitoring program. In addition, the Appellant's driver's license was suspended for one year. With respect to the conviction under § 3323(a), the Appellant was fined $25.00 and ordered to pay costs and fees. No post sentence motions were filed. The Appellants *pro se* appeal followed.

The Appellant presents four questions for our review:

1. Whether the [trial] court erred in pretrial determination to allow defendant's credibility witnesses to be cross-examined by Commonwealth regarding the defendant's prior arrest and penalty of ARD.
2. Whether lower court erred in failing to submit stop sign charge to jury for ruling in violation of defendant's right to jury trial as was requested by defendant.
3. Whether defendant's counsel violated ethical codes, and in turn did not provide a complete defense.
4. Whether Judge McCormick showed bias in his ruling.

In the appellant's first issue on appeal, he challenges the trial court's pre-trial ruling permitting the Commonwealth to cross-examine the Appellant's character witnesses regarding his prior arrest and conviction for DUI.

Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and will not reverse the court's decision absent an abuse of discretion. Commonwealth V. Zugay, 2000 PA Super 15, 13.

It does not appear from the record that Appellant's trial counsel filed a formal motion *in limine*, but instead made an oral motion prior to trial. Although the Appellant has attached a copy of the pre-trial proceedings to his brief he failed to include the transcript of these proceedings in the certified record. "It is Appellant's responsibility to supply this court with a complete record for purposes of appeal, Pa.R.A.P. 1911, and we may not consider any information which is not contained in the certified record." Commonwealth V. Hallock, an item does not become part of the certified record by simply copying it and including it in the reproduced record. Pa. R.A.P. 1921.

In addition, the Appellant failed to include the transcript of the trial proceedings in the certified record to permit this Court to examine if character witnesses were in fact cross-examined regarding the Appellant's prior DUI conviction which resulted in his acceptance into the ARD program. We are unable to rely on the trial court's opinion for any guidance with respect to the issue raised herein. The trial court opinion only references the propriety of the pre-trial ruling as it related to permitting the Commonwealth's rebuttal witness, the arresting officer from Appellant's first DUI, to testify regarding the Appellant's prior conduct which contradicted Appellant's claim he had a reputation in the community for sobriety. Because the trial court opinion does not address its ruling as it applied to the absence of the necessary transcripts, we decline to address Appellant's first issue any further.

In the Appellant's second issue, he argues the trial court erred in failing to charge the jury on the summary offense of § 3323(a). The right to a jury trial attaches when

one is accused of a crime which the authorized penalty is more than six months. Eichenlaub V. Eichenlaub, 490 A.2d 918 (Pa. Super. 1985); Baldwin V. New York, 399 U.S. 66 (1970). Here, the Appellant was charged with disregarding a stop sign pursuant to § 3323(a). A conviction under this section is considered to be a summary offense which carries a penalty of a $25.00 fine. 75 Pa. C.S.A. § 6502(a). Accordingly, the question of whether the Appellant violated § 3323(a) could only be determined by the trial court rather than the jury. As no jury charge on § 3323(a) was warranted here, we find no merit to the Appellant's second contention.

We need not address the Appellant's third and fourth issues on appeal, as they have not been adequately preserved for appellate review. In Commonwealth V. Lord, 553 Pa. 415, 719 A.2d 306 (1998), our Supreme Court found in order to preserve claims for appellate review, appellants must comply whenever the trial court orders them to file a 1925(b) statement challenging the trial court's pre-trial ruling regarding the scope of cross-examination of the Appellant's character witnesses and the trial court's failure to charge the jury on § 3323(a). However, he failed to raise any claims respecting trial counsel's violation of ethical codes or ineffectiveness for failing to provide a complete defense. In addition, the Appellant failed to raise any claim of trial court bias. Accordingly, the trial court did not address these claims in its Opinion. Because the Appellant failed to comply with the dictates of Rule 1925(b), we find Appellant's third and fourth issues are waived.

Judgment of sentence affirmed.

Judgment Entered.

"s/David A. Szewczak"
Prothonotary Date: April 13, 2000

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY,
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
VS.	)	
	)	No. 1967 C
JEFFREY R. SCARCELLI,	)	1998
Defendant	)	
	)	

OPINIONS IN SUPPORT OF ORDER APPEALED FILED PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURES NO. 1925(a)

BY: RICHARD E. McCORMICK, JR., JUDGE

AND NOW, to wit this September 25, 1999, pursuant to PA. R.A.P. 1925(a), the court hereby issues the following opinion in support of the order from which the Defendant appeals.

In his Concise Statement of the Matters Complained Of On Appeal, the Defendant alleges that the trial court erred in allowing the Defendant's credibility witnesses to be cross-examined with regard to the Defendant's prior arrest and conviction for driving under the influence, and that the trial court erred when it made a finding of guilt on the summary traffic offense charged, rather than submitting the issue for the jury's determination. Because the Defendant is preceding *pro se*, without the benefit of legal counsel, and, in his unfamiliarity with proper legal procedure, has failed to request that the appropriate parts of the trial testimony be transcribed by the court reporter, we will address the issue

raised herein based upon our recollection of what transpired at trial.

With regard to the Defendant's first allegation of error, defense counsel, during pre-trial motions argued in chambers immediately prior to the commencement of trial, announced his intention to call character witnesses on behalf of the Defendant who would testify as to the Defendant's reputation for sobriety and law abiding behavior. With this proffer, defense counsel made a motion *in limine* in which he sought to exclude evidence of the Defendant having previously been placed in the accelerated rehabilitative disposition program after being arrested on one prior occasion for driving under the influence of alcohol. This court agreed that Pennsylvania Rule of Evidence No. 405(a) prohibited the admission of evidence of arrest of the accused which did not result in conviction, which would include ARD disposition. Commonwealth V. Scott, 496 Pa. 188, 436 A.2d 607 (1981). However, under PA. R.E. No. 405(b)(2), a reputation witness may be cross-examined regarding specific instances of conduct.

Accordingly, we ruled that the police officer who arrested the Defendant on the first DUI charge could testify with regard to his observations of the Defendant in an intoxicated state on that prior occasion. In other words, if the Defendant placed his reputation for sobriety at issue with the testimony of character witnesses, the officer could testify in rebuttal that he observed specific instances of conduct which illustrated the Defendant's lack of sobriety.

With regard to the Defendant's second allegation of error, the Defendant was charged with violating § 3323(a) of the Pennsylvania Motor Vehicle code, 75 Pa.C.S. § 3323(a), "Stop Signs and Yield Signs," a summary offense. The maximum possible penalty which can be imposed for a violation of this motor vehicle code provision does not include any period of incarceration. "[A] defendant is entitled

to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." Blanton V. City of North Las Vegas, Nevada, 399 U.S. 66, 68, 90 S. Ct. 1886, 1887, 26 L.Ed.2d 437 (1970). "It has long been settled that there is a category of petty crimes or offenses which are not subject to the Sixth Amendment jury trial provisions. "Duncan V. Louisiana, 391 U.S. 145, 159, 88 S. Ct. 1444, 1452, 20 L.Ed.2d 491 (1968)." Blanton V. City of North Las Vegas, Nevada, 489 U.S. 87. 109 S. Ct. 1289, 103 L.Ed.2d 550 (1989).

Based upon these established principles, we appropriately denied the Defendant's request that the jury be permitted to deliberate to a verdict on the traffic offense charged under 75 Pa.C.S. § 3323(a). See also Commonwealth ex rel. V, Mayernik, 72 Pa.D. & C. 10, 98 pitts.L.J. 213 (1950).

BY THE COURT:

"s/ Richard E. McCormick, Jr."
Judge Richard E. McCormick Jr.

Attest:

_____
Clerk of Courts

cc: Allen P. Powanda, esquire – Assistant District Attorney
Jeffrey R. Scarcelli, *pro se*
Court Administrator's Office

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PA
CRIMINAL DIVISION

* * *

COMMONWEALTH OF PENNSYLVANIA)	
)	
VS.	) No.
	) 1967 c
JEFFREY R. SCARCELLI,	) 1998
)	
Defendant.	)

HEARD: Monday, June 7, 1999

BEFORE: Judge Richard E. McCormick, Jr.

* * *

PARTIAL PRE-TRIAL PROCEEDINGS

* * *

APPEARANCES

On Behalf of the Commonwealth:
Allen P. Powanda, Esq.
Assistant District Attorney

On Behalf of the Defendant:
Timothy Dawson, Esq.

PROCEEDINGS

* * *

(The following is a portion of the proceedings which occurred pre-trial in chambers with the Judge and both attorneys present.)

THE COURT: Commonwealth versus Jeffrey Scarcelli at No. 1967 C 1998. It's a matter that's been called for trial. We're in chambers with Al Powanda on behalf of the Commonwealth and Timothy Dawson on behalf of the Defendant. It's been indicated that the matter is going to be for a jury trial. The charges are two counts of driving under the influence, and a summary offense of stop signs, which the summary will be the responsibility of the Court to decide once the jury has retired to deliberate. Are there any pre-trial motions that you wish to raise?

MR. DAWSON: Your Honor, if I may, we commenced this trial with Judge...

if you look at 405, the language specifically states –

THE COURT: Well, the language says inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases, inquiry into arrests of the accused not resulting in conviction is not permissible.

MR. DAWSON: Right

THE COURT: But the conduct itself, I believe, is admissible. The arrest – the fact that he was arrested is separate and apart from the fact that this circumstance occurred, this factual circumstance occurred.

MR. DAWSON: I'm not quite following the Court.

THE COURT: Well, I mean, the arrest – his arrest is just technical term for what happened once they observed all the factual circumstances of the previous incident. Arrest itself – he can't come in here and say we have a record of an arrest. To me, ...

Are you going – what are you permitted to ask, because then I have to make a decision whether to put character witnesses on, and not putting on character witnesses can be ineffective assistance of counsel, so I need to know the parameters.

MR. POWANDA: I would phrase the question in that fashion. If there's a BAC result substantiating that he was under the influence or intoxicated, I would ask the person about that.

MR DAWSON: But that –

MR. POWANDA: I'm not even sure I would.

THE COURT: And I would approve of that. That's admissible in that form.

MR. POWANDA: But see, you want to ask these people, are you aware of the Defendant's reputation for sobriety?

MR. DAWSON: Right.

MR. POWANDA: And they are going to say, oh, yeah, he's always sober.

MR. DAWSON: They are not going to say that. They are going to say, ...

the officers involved in the ARD prosecution, and testify that he had stopped him, made their observations, field sobriety tests.

THE COURT: Yes, those are prior to arrest.

MR. DAWSON: You might as well have the arrest. I mean, that's really the fiction.

THE COURT: Those are required prior to the arrest. Those are the probable cause aspects that then lead to an arrest. Those are all things that are indicative of his having consumed alcohol and not being a sober person.

MR. DAWSON: My problem with that is, though, it's also indicative that he was incapable of safe driving on another occasion, and that goes to the heart of this case.

THE COURT: Everything up till the indication that you are now under arrest will be admissible as proper rebuttal under the – if you offer character evidence of sobriety. That's my ruling.

CERTIFICATE

* * *

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me at the hearing of the within cause and that this copy is a true and correct transcript of the same.

"s/ Judith M. Shutak,
Official Court Reporter

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PA.

CRIMINAL DIVISION

* * *

COMMONWEALTH OF PENNSYLVANIA)	
)	
VS.	) No. 1967
	) c 1998
JEFFREY R. SCARCELLI,	)
)	
Defendant.	)

HEARD: June 7-8, 1999

BEFORE: Honorable Richard E. McCormick, Jr.

* * *

JURY TRIAL, PARTIAL PROCEEDINGS

* * *

APPEARANCES

On Behalf of the Commonwealth:
Allen P. Powanda, Esq.
Assistant District Attorney

On Behalf of the Defendant:
Timothy P. Dawson, Esq.

THE COURT: Ladies and Gentlemen, this isn't the verdict slip you're going to get, because there's something I have to have changed on here, but don't worry about that, but I will make reference to those things that concern you here. Essentially, you have Count 1 here, which is driving under the influence, and next to it, we have incapable of safe driving, and then under Count 2, driving under the influence. .10 percent or greater. Those are the two counts that you have to consider and you have to indicate a verdict for. So you will come down here on the slip, and it reads, and now to wit, June blank, that's the first thing the foreperson has to do, is put the correct date of the verdict in, and then it says, 1999, we, the 12 jurors, find the Defendant, and then you will just indicate, Count 1, guilty or not guilty, and Count 2 guilty or not guilty. Once you have a unanimous verdict with regard to each count in that regard, you will enter them on here, the foreperson will sign down here on this line at the bottom, indicate to the tipstaff that you have a verdict, and we will bring you back into the Courtroom to deliver that verdict publicly. Now, I ask the first 12vof you if you know of any reason why you cannot be a fair and an impartial juror in deliberating to a verdict in this case? Let the Record show that there's no response. Alternate 1, we now have to separate you from you colleagues. I want to....

Appendix H(2)

CERTIFICATE

* * *

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me at the hearing of the within cause and that this copy is a true and correct transcript of the same.

"s/ Judith M. Shutak"
Judith M. Shutak,
Official Court Reporter